

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



75-2069

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DONALD WALLACE, et al., :  
Plaintiffs-Appellees, :  
-against- :  
MICHAEL KERN, et al., :  
Defendants-Appellants.

UNITED STATES ex rel. MICHAEL A. MCLAUGHLIN, :  
Plaintiffs-Appellees, :  
-against- :  
THE PEOPLE OF THE STATE OF NEW YORK, et. al., :  
Defendants-Appellants.

No. 75-2069

MICHAEL A. MCLAUGHLIN, et. al., :  
Plaintiffs-Appellees, :  
-against- :  
THE PEOPLE OF THE STATE OF NEW YORK, et. al., :  
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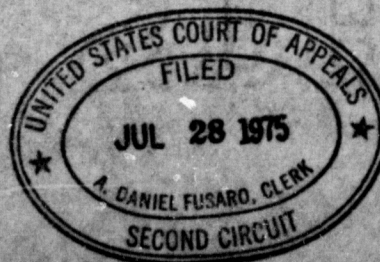
PETITION FOR REHEARING AND  
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PETITION FOR REHEARING AND  
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Pursuant to FRAP, §35 and 40, Petitioners respectfully  
request a rehearing of this appeal and suggest that the re-

hearing be en banc. A rehearing is necessary because the court in reaching its decision misapprehended the applicable law as applied to the circumstances of this case, and because the action involves questions of exceptional importance to the rights of indigent criminal defendants in urban judicial systems. The panel in holding that the relief granted by the District Court is barred by considerations of federalism and comity misconstrued both the nature of the problem considered by the court below, and the applicability of Younger v. Harris, 401 U.S. 37 (1971), and its progeny. First, ensuring procedural safeguards for a class, consistent with the Fourteenth Amendment, does not interfere with the merits of an individual criminal case, particularly where, as in New York, state remedies, although available in theory, are totally ineffective in practice. Second, the court in its discussion was concerned solely with the incidents of the evidentiary bail hearing and failed or refused to discuss the basic due process requirement, a written statement of reasons for the individual bail determination.

I. Comity Considerations.

The policy of Younger v. Harris, supra, reflects an overriding concern for the integrity of individual state cases, and a belief that federal courts should not enjoin or litigate piecemeal the merits of pending state criminal actions. Younger was never meant to shield systemic unconstitutional state procedures from

review by federal courts. By contrast, in Gerstein v. Pugh, 95 S. Ct. 854 (1975), and Conover v. Montemuro, 477 F. 2d 1073, (3rd Cir., 1973), cited with approval in Gerstein, relief was granted on a class basis against systematic abuses of constitutional rights at early stages of state judicial proceedings, in much the same situation as exists in Kings County.

Underlying the concept of federalism is the presumption that state courts will operate constitutionally to protect the individual's rights, and federal scrutiny is generally unnecessary. However, when unconstitutional procedures are the rule rather than the exception in the state courts, the presumption of regularity is neither realistic nor required. Moreover, the panel's fear that pre-trial detainees who claim a violation of the District Court's order would come to the federal court in increasing numbers for clarification (sl. op. 4557-58) is unfounded, since as the court noted, the adequacy of the hearing and of the statement of reasons must necessarily be raised in the state court in the first instance. Federal review of any bail determination could only occur by writ of habeas corpus after exhaustion of available state remedies. Thus the spectre raised in O'Shea v. Littleton, 414 U.S. 488 (1974), of massive ongoing audit of state court proceedings is baseless and unfounded.

The key to the relevancy of Younger is the ability to raise the particular issue in defense of the merits of a pending state proceeding, and as a corollary, the presence of effective state

remedies to redress the constitutional deprivations. The comity cases decided since Younger, including the post Gerstein cases cited by the court, are all concerned with protecting the integrity of the merits of individual cases. Thus, the court's reliance on those cases in the context of the constitutional deprivations suffered by the class is misplaced.<sup>1</sup>

Further, the court misconstrued the nature of the Gerstein comity ruling. That holding did not turn on the availability of collateral relief (habeas corpus), as stated by the panel, but rather on the fact that the procedural relief ordered for the plaintiff class "was not directed at the state prosecutions as such....," but at "an issue that could not be raised in defense of the criminal prosecution," 95 S. Ct. at 860 n. 9. In Kings County collateral habeas corpus relief, while theoretically available, is ineffective because substantial periods of incarceration may pass before a defendant can secure a hearing on the

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1. While Hicks v. Miranda, 43 U.S.L.W., 4857 (U.S. June 24, 1975), appears to minimize the rule in Steffel v. Thompson, 415 U.S. 452 (1974), and to apply Younger when no state proceeding is pending, the Supreme Court in Doran v. Salem Inn, Inc., 43 U.S.L.W. 5039 (U.S. June 30, 1975), decided the very day this court decided the instant case, held that Younger applied only if charges were filed, or as in Hicks, other state judicial proceedings had occurred before the federal action, but not when prosecution was merely threatened and the state had not acted. Under Steffel and Doran, the District Court properly considered the merits, at least as to the prospective class.

propriety of the bail determination (sl. op. 4549-50). The presence or absence of collateral remedies in individual cases was not contemplated by Younger, and does not bar a class action for relief from procedural due process violations. The remedy contemplated in Younger was the defense of the criminal action itself, not the institution of a separate action in a different forum.<sup>2</sup> Moreover, federal intervention was proper in Gerstein because although the plaintiffs eventually got a hearing, it did not occur until they had been "detained for a substantial period," usually in excess of thirty days, 95 S. Ct. at 859, much the same as occurs here.

Proper application of these principles warrants consideration of the merits, as illustrated by the record as interpreted by the District Court and this court. All witnesses who testified, including state court judges, agreed that those factors known as "roots in the community" (which are highly relevant to the bail determination), tend to deteriorate in proportion to the length of incarceration. Thus, bail review at later stages in the case, after an indictment's family, educational and employment ties have been severed, is inadequate to protect his rights. This conclusion was fortified by the testimony of Justice Barshay, the Presiding Justice of Special Term, Part 10, the Supreme Court's bail review part:

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2. By analogy, the only exhaustion requirement under 28 USC, §2254, is that direct appeals in state court be exhausted. The petitioner for a federal writ of habeas corpus is not required to bring state habeas corpus or coram nobis proceeding before he invokes federal jurisdiction.

- Q. Judge Barshay:  
Is the defendant's root in the community  
an important factor?
- A. Very important.
- Q. Very important. And is it your experience  
as a trial judge that for a person in jail  
his roots in the community will deteriorate  
the longer he's kept incarcerated?
- A. Of course, it's natural.
- Q. So that means then, that if you grant the  
bail reduction motion to a person who has  
been in jail or you release a person on  
his own recognizance who's been in jail 15  
months, roots in the community will be  
substantially less at that stage of the case  
than initially?
- A. It could be. (App. 330).

The record further reflects that whatever the outcome of a Special  
10 bail review,<sup>3</sup> the defendant is often unable to meet the re-  
duced bail.<sup>4</sup> Clearly, then, the court did not understand the  
nature of bail reviews held after months of incarceration and the  
irreparable injury caused by the initial bail determination which  
as the court found, is "often based on incomplete or inadequate

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3. The court's statement that "in Special Term, Part 10, in Kings  
County, evidentiary type hearings are now granted," (sl. op.  
4561) is a mis-statement. Justice Barshay, testified both on  
direct and cross examination that he relies on the lawyer to  
present information in the form of oral argument. (App. 326,  
332-3, 346). This hardly rises to the level of evidence.

4. See statistics compiled from records of Special 10, as set  
forth in the Affidavit of John Boston (Appellee's separate  
appendix 341).

information." (sl. op. 4551). The procedures ordered by Judge Judd would help to alleviate this problem. Due process requires no less.

The court dismissed Judge Judd's findings of fact regarding the inadequacy of state remedies by relying on the facial constitutionality of the state's statutory scheme. However, it matters not whether the constitutional violations complained of are based on unconstitutional statutes or as here, result from the improper conduct of state officers charged with applying that scheme.

Monroe v. Pape, 365 U.S., 167 (1960), teaches us that the protections of the Civil Rights Act are meant to apply to situations like the present one, where a state remedy, although theoretically available, is ineffective in practice.<sup>5</sup>

Finally, in Gerstein the court held that the detailed provisions for conducting the preliminary hearing mandated by the District Court were an unwarranted interference in the state court's processes. However, instead of denying jurisdiction, the Supreme Court remanded the action with instructions to enter an order consistent with the Fourth Amendment's probable cause requirement. So in this case, the appropriate procedure would have been to reach the merits, articulate the proper scope of relief, and remand for proceedings consistent with the court's opinion.

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5. Even in U.S. ex. rel. Shakur v. Commissioner of Correction, 303 F. Supp. 303 (SDNY, 1969) aff'd. 418 F. 2d 243 (2nd Cir., 1969), cited by the court (sl. op. 4561), the District Court accepted jurisdiction because by the time the state's appellate process could have been exhausted, the issue of reasonable bail would have been rendered moot.

## II. The Requirement of a Written Statement of Reasons.

The District Court's opinion and judgment are clear that the requirement that a written statement of reasons be given for each bail determination is separate and apart from the incidents of the evidentiary bail hearing. The statement of reasons is to be given each time bail is fixed or reviewed, no matter the procedure followed in the particular bail proceeding.

This first basic tenet of due process is erroneously lumped together with the other hearing requirements and is totally ignored by the court. The requisite of a statement of reasons implicates none of the policy considerations underlying Younger. The failure to comply cannot be cured in the defense of the merits of a single criminal proceeding, nor can the issue be effectively raised on appeal from a conviction, because by then it is too late to remedy the harm flowing from an improper bail determination. As the District Court found, without a statement of reasons the initial bail determination is virtually incapable of meaningful review. U.S. ex. rel., Johnson v. Board of Parole, 500 F. 2d 925 (2nd Cir., 1974). That is precisely the situation in which Younger and subsequent cases permit intervention. It is incumbent on the federal court to redress wholesale violations of this basic constitutional right by the state courts.

The New York State courts have foreclosed the possibility of class-based relief to rectify the constitutional infirmities of the state's bail setting procedures. In Bellamy v. Judges, 41 A.D. 2d 196 (1st Dept. 1973) aff'd. per curiam 32 NY 2d 886 (1973).

the Appellate Division rejected claims similar to those raised herein despite an occasional different result reached in earlier state cases. This court's ruling now leaves plaintiffs' class with no possible forum in which their claims can be heard. It is anamolous indeed that the protections of the due process clause are being applied to a broad spectrum of state institutions including prisons, hospitals, and schools, yet official lawlessness by the state courts, the very institutions mandated to uphold the law, is openly sanctioned.

### III. The Importance of the Issues.

In previous grants of en banc consideration this Court considered important issues going to the administration of criminal justice. The issue of lengthy trial delays for incarcerated pretrial defendants was heard en banc four years ago because "the delay(s).... raises serious questions of the violation of the constitutional rights" of those in jail awaiting trial. United States ex. rel. Frizer v. McMann, 437 F.2d 1312 at 1313n (2d. Cir., 1971) (en banc). The issues raised herein go directly to the ability of poor people to obtain some measure of justice in the state's criminal courts. Granting of en banc relief, would permit "....a plenary review to a complex of urgent social and political conflicts persistently seeking solution in the courts as legal problems." Sostre v. McGinnis, 442 F.2d 178 (2d Cir., 1971) (en banc). Certainly the questions raised in this case pose no less fundamental problems that must be resolved by this Court.

Bail determination made on the basis of incomplete and inaccurate information, without reasons publicly stated to enable review

violates due process of law especially when a person's liberty is at stake. The issues involved are currently sub judice in the Southern District of New York in Roballo v. Ross, No. 74 Civ. 2113. Their importance cannot be underscored because they are recurring questions going to the heart of the administration of criminal justice in New York City and other urban centers. En banc consideration would present the real question raised by this appeal: whether the rights to meaningful bail determinations extend to poor people in fact or only in form.

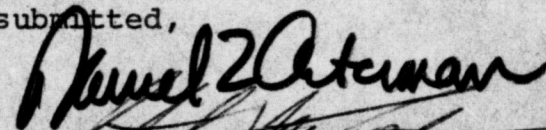

IV. Conclusion.

To say that federal courts cannot be ombudsmen charged with the responsibility of reforming the state penal system begs the question. The panel's decision gives the state a blanket approval to continue to operate and ignore the rights of indigent criminal defendants. To permit the state system to continue to operate in this manner disregards the realities of urban mass justice. Indeed, to allow this decision to stand leaves members of appellees' class with no remedies, legal or equitable, at all. For the foregoing reason the petition for rehearing and for en banc consideration should be granted.

Respectfully submitted,

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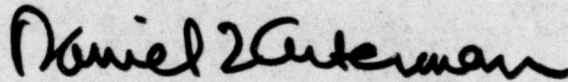
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CERTIFICATE OF SERVICE

This is to certify that on July 25, 1975, a copy of the  
Petition for Rehearing And For Rehearing En Banc was  
mailed to:

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Dated: New York, New York  
July 25, 1975

RECEIVED  
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